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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/709,746	05/26/2004	Michael P. Wenniger	FUNU 0102 PUSP	3745
22045	7590	12/28/2004	EXAMINER	
BROOKS KUSHMAN P.C. 1000 TOWN CENTER TWENTY-SECOND FLOOR SOUTHFIELD, MI 48075			COE, SUSAN D	
			ART UNIT	PAPER NUMBER
			1654	

DATE MAILED: 12/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/709,746

Applicant(s)

WENNIGER, MICHAEL P.

Examiner

Susan D. Coe

Art Unit

1654

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 December 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) 8-14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 8/23/04.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

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DETAILED ACTION

1. Claims 1-14 are currently pending.

Election/Restrictions

2. Applicant's election with traverse of Group I, claims 1-7 in the reply filed on December 10, 2004 is acknowledged. The traversal is on the ground(s) that the product cannot be used to practice a different process. This is not found persuasive because as discussed in the previous Office action, the claimed composition contains tyrosine. Compositions comprising tyrosine are known to be used to treat depression. Thus, the claimed composition can be used for a materially different purpose from inducing weight loss.

In addition, applicant argues that the restriction requirement is burdensome on applicant. However, since the restriction is considered proper for the reasons discussed above and in the previous Office action, this argument is not persuasive. Applicant is only entitled to claim one invention. However, please note the section found on pages 3 and 4 of the previous Office action regarding rejoinder process for allowable product claims.

The requirement is still deemed proper and is therefore made FINAL.

3. Claims 8-14 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim.

Applicant timely traversed the restriction (election) requirement in the reply filed on December 10, 2004.

4. Claims 1-7 are examined on the merits.

Claim Objections

5. Claims 3, 6, and 7 are objected to because of the following informalities:

“cyanocobalamin” is misspelled as “cyanacobalamin.” Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-7 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

6. Claims 1, 6, and 7 contains the trademark/trade name CitriMax. Where a trademark or trade name is used in a claim as a limitation to identify or describe a particular material or product, the claim does not comply with the requirements of 35 U.S.C. 112, second paragraph. See *Ex parte Simpson*, 218 USPQ 1020 (Bd. App. 1982). The claim scope is uncertain since the trademark or trade name cannot be used properly to identify any particular material or product. A trademark or trade name is used to identify a source of goods, and not the goods themselves. Thus, a trademark or trade name does not identify or describe the goods associated with the trademark or trade name. In the present case, the trademark/trade name is used to identify/describe hydroxycitric acid or Garcinia cambogia extract and, accordingly, the identification/description is indefinite.

7. Claim 6 is indefinite because the unit has been omitted after 6.000 in line 8.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claim 1 is rejected under 35 U.S.C. 103(a) as being unpatentable over US Pat. No. 6,491,540 in view of WO 01/05356 and US Pat. No. 5,817,329.

Applicant's claims are drawn to a lollipop composition containing Guarana PE 22%, CitriMax, and L-tyrosine. Paragraph 15 of applicant's specification defines Guarana PE 22% as guarana extract containing 22% caffeine. Paragraph 16 defines CitriMax as hydroxycitric acid or Garcinia cambogia extract.

US '540 teaches a lollipop composition. The lollipop contains corn syrup. The lollipop is used as a delivery device for weight control ingredients. Guarana is taught as an example of such an ingredient (see column 5, lines 13-54). Thus, the reference teaches incorporating weight control ingredients such as guarana into a lollipop; however, the reference does not teach the amount of caffeine in the guarana or using hydroxycitric acid or tyrosine in the composition.

WO '356 teaches using tyrosine (see paragraph spanning pages 17 and 18) and hydroxycitric acid containing extracts of G. cambogia (see page 18, lines 11-18) to reduce weight. In addition, the reference teaches that guarana naturally contains caffeine (see page 11, line 5-12). The reference also teaches including maltodextrin in the pharmaceutical compositions (see page 26). Thus, it was known in the art at the time of the invention that hydroxycitric acid and tyrosine can be utilized to reduce body weight. Therefore, a person of

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ordinary skill in the art would reasonably expect that hydroxycitric acid and tyrosine could advantageously be used in the weight loss lollipop containing guarana taught by US '540.

Motivation for such combination flows logically from their having been used individually in the prior art for the same purpose (see MPEP section 2144.06).

Guarana is known to naturally contain caffeine; however, neither reference teaches using a guarana extract with 22% caffeine. US '329 teaches using a guarana extract that contains 22% caffeine. This guarana extract is useful in reducing body fat and helping to build lean muscle mass (see column 5, lines 21-38). Thus, this guarana extract would clearly be useful in a method of reducing body fat. Therefore, a person of ordinary skill in the art would be motivated to modify the lollipop composition taught by the combination of US '540 and WO '356 to include guarana with 22% caffeine.

9. Claims 2-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Pat. No. 6,491,540, WO 01/05356 and US Pat. No. 5,817,329 as applied to claim 1 above, and further in view of US Pat. No. 5,968,544.

As discussed above, the combination of US '540, WO '356, and US '329 teaches a lollipop composition as claimed in applicant's claim 1 and teaches incorporating corn syrup and maltodextrin in the composition. However, the references do not specifically teach adding vitamins B6 or B12 to the composition. Cyanocobalamin is a synthetic form of vitamin B12. US '544 teaches that individuals on weight loss diets should supplement their diets with vitamins including vitamins B6 and B12 (see column 3, lines 28-55). Thus, a person of ordinary skill in the art would reasonably expect that adding vitamins B6 and B12 to the lollipop composition of US '540, WO '356, and US '329 would be beneficial to the health of the individual using the

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lollipop. Therefore, based on this reasonable expectation of successful results, an artisan of ordinary skill would be motivated to add vitamins B6 and B12 to the lollipop composition taught by the combination of US '540, WO '356, and US '329.


The references do not specifically teach adding the ingredients in the amounts claimed by applicant. The amount of a specific ingredient in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan of ordinary skill to determine the optimal amount of each ingredient to add in order to best achieve the desired results. Thus, absent some demonstration of unexpected results from the claimed parameters, this optimization of ingredient amount would have been obvious at the time of applicant's invention.

10. No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan Coe whose telephone number is (571) 272-0963. The examiner can normally be reached on Monday to Thursday from 8:00 to 5:30 and on alternating Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Bruce Campell, can be reached on (571) 272-0974. The official fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (571) 272-1600.


12-21-04
Susan D. Coe
Primary Examiner
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